erty on credit is beyond the scope of this article. Indeed, it has even been suggested that it is not properly a matter of consideration by the court.[28] However, the theory has been advanced that whatever the decision on the desirability of the application of the statute may be, it would be desirable to hold that the statute does apply, since the application of the statute may be the best way to bring about a change,[29] either by complete abolition of the provisions relating to sales or by substitution of new statutes similar to the small loan statutes.[30]

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[28] "That our usury law is harsh in its language and effect is obvious from a mere reading. . . . However, insofar as the act establishes a legislative policy, there is and can be no judicial quarrel with legislative policy. The court does its duty when it carefully inquires whether there is a violation of the statute and if there is gives to it the effect prescribed by the Legislature." Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739, 744 (1944).

[29] One writer states that if finance companies believe they are hurt by such a holding, they will quickly solicit the legislature for a change, whereas the unorganized and inarticulate consumers may be unable effectively to present their problem if it is held that the statute does not embrace the credit sale. Berger, *Usury in Installment Sales*, 2 LAW & CONTEMP. PROB. 148, 171 (1935); see also 23 CORNELL L.Q. 619 (1938). It must be remembered that in Iowa such a holding would not have nearly so drastic an effect under the Iowa penalty provisions as it would have under the penalty provisions of many states which make void the contract on which the usurious interest was charged. Compare IOWA CODE § 535.5 (1950) with MINN. STAT. § 334.05 (1949).

[30] For the view that individual laws should be passed for each type of financing rather than a uniform usury law, see Bogert, *Future of Small Loan Legislation*, 12 U. OF CHI. L. REV. 1, 18 (1944); Hubachek, *The Drift Toward a Consumer Credit Code*, 16 U. OF CHI. L. REV. 609 (1949); 38 HARV. L. REV. 993 (1925).

ATTRACTIVE NUISANCE IN IOWA

The Iowa Supreme Court has repeatedly recognized an attractive nuisance doctrine founded upon a theory of implied invition.[1] Acceptance was first announced in *Edgington v. Burlington, C.R. & N. Ry.*[2] A railroad company maintained a turntable on an unfenced lot near a public alley through which children were known to pass. Several of these children were attracted to and played upon the turntable. The plaintiff, a seven year old girl, was permanently injured when the fastening was released by one of the children. The gist of the cause of action was the keeping of an ill-guarded dangerous machine in a place where children might reasonably be expected to play upon it. The question whether the fastening was such that it showed due care by the defendant to guard against such injuries and the question of the plaintiff's capacity to appreciate the danger were left to the jury. Judgment for the plaintiff was affirmed. Although a child in such a case is technically a trespasser to whom the owner owes no duty beyond refraining from affirmative acts of harm, the attractiveness of the dangerous agency was construed to be an implied invitation taking the child out of the trespasser class and making him an "invitee." Thus, under a duty to make the premises safe for an invitee the owner was held liable to the child for injuries sustained because of breach of that duty.

Since the *Edgington* case general rules for the application of the doctrine have been developed. The agency, of course, must be attractive to children or there is no implied invitation.[3] The defendant must know or be chargeable with knowledge that the instrumentality is dangerous.[4] It must be artificial and not a natural object such as a pond or stream,[5] *i.e.*, it must be created by the positive act of the owner. It is also excluded from the doctrine when it is not inherently dangerous,[6] does not have an inviting and ready means of access or approach,[7] or is a necessity of business and in-

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[1] See, *e.g.*, Harriman v. Afton, 225 Iowa 659, 662-664, 281 N.W. 183, 185 (1938).

[2] 116 Iowa 410, 90 N.W. 95 (1902).

[3] Anderson v. Fort Dodge, D.M. & So. R.R., 150 Iowa 465, 130 N.W. 391 (1911) (alternative holding). A boy jumped to the roof of defendant's building from a boxcar and was injured striking an electric wire while jumping back. There was no implied invitation since nothing on the roof attracted the boy.

[4] Wilmes v. Chicago G.W.R.R., 175 Iowa 101, 156 N.W. 877 (1916).

[5] Blough v. Chicago G.W.R.R., 189 Iowa 1256, 179 N.W. 840 (1920) (pond formed by natural drainage).

[6] Massingham v. Illinois Cent. R.R., 189 Iowa 1288, 179 N.W. 832 (1920).

[7] Cox v. Des Moines Elect. Light Co., 209 Iowa 931, 229 N.W. 244 (1930).

dustry not negligently used or left openly unguarded.[8] Location is important.[9] The owner must have failed to use reasonable care in guarding against probabilities, but not possibilities.[10] There must be a trespass.[11]

The remaining element necessary to liability is lack of capacity of the infant trespasser to appreciate the danger of the agency.[12] Application of this rule must depend upon the particular child and circumstances. Thus in *McKiddy v. Des Moines Elect. Co.*[13] a boy of thirteen was found by the jury to lack the capacity to appreciate the danger of electrocution in climbing one of the defendant's poles and sitting upon the cross arm. In *Harriman v. Afton,*[14] however, the court held in a directed verdict for the defendant that a boy of the same age did appreciate the danger of going upon a reservoir on a raft used by workmen for measuring the depth of the water.

It should be pointed out that a difference exists between the capacity of a child of tender years to be a trespasser, *i.e.,* to appreciate the danger of an attractive and dangerous agency, and the capacity necessary for guilt of contributory negligence.[15] In the *Edgington* case the court considered the capacity of the child to be contributorily negligent before submitting to the jury the question of her ability to appreciate the danger of the agency.[16] As the law developed, however, the standard for contributory negligence fell into an accepted pattern, well expressed in *McEldon v. Drew,*[17] in which children under seven are incapable of contributory negligence as a matter of law, and children between seven and fourteen are presumed incapable of contributory negligence, although the contrary may be shown.

The importance of the distinction is easily seen. For example, a boy of twelve injured by a dangerous device left upon a sidewalk can probably recover as being presumptively free from contributory negligence as stated above; if the same boy is attracted by the same agency a few feet within the owner's yard and trespasses thereon, he may not recover for injury because his intelligence and

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[8] *See* Hart v. Mason City Brick & Tile Co., 154 Iowa 741, 744, 135 N.W. 423, 424 (1912); Brown v. Rockwell City Canning Co., 132 Iowa 631, 635, 110 N.W. 12, 13 (1906). *But cf.* Ashbach v. Iowa Tel. Co., 165 Iowa 473, 146 N.W. 441 (1914).

[9] Ashbach v. Iowa Tel. Co., *supra* note 8 (unguarded agency near a school). *But cf.* Nelson v. Lake Mills Canning Co., 193 Iowa 1346, 188 N.W. 990 (1922); Wood v. Independent School Dist. of Mitchell, 44 Iowa 27 (1876).

[10] *See* Cox v. Des Moines Elect. Light Co., 209 Iowa 931, 938, 229 N.W. 244, 247 (1930); see note 7 *supra.*

[11] Smith v. Iowa City, 213 Iowa 391, 239 N.W. 29 (1931) (children on a city playground not trespassers).

[12] See Harriman v. Afton, 225 Iowa 659, 669, 281 N.W. 183, 188 (1938).

[13] 202 Iowa 225, 206 N.W. 815 (1926).

[14] 225 Iowa 659, 281 N.W. 183 (1938).

[15] See Thomas v. Chicago, M. & St.P. Ry., 93 Iowa 248, 255, 61 N.W. 967, 969 (1895).

[16] See 116 Iowa 410, 413, 90 N.W. 95, 96 (1902).

[17] 138 Iowa 390, 395, 116 N.W. 147, 149 (1908).

experience are such that he may be able to appreciate the danger of the agency and is therefore not taken out of the trespasser class.

The Iowa Court has had some difficulty in determining what to call the infant who has been taken out of the trespasser class by the application of the attractive nuisance doctrine. It is usually said that he is an "invitee."[18] This terminology is subject to criticism since the term connotes a person upon the land for the mutual benefit of himself and the landowner, which is not true of the trespassing infant. Once taken out of the class because of the implied invitation growing out of the attractive agency he is more than a "bare licensee" who is merely upon the land in his own interest by permission of the landowner. The term "licensee by invitation" from Iowa negligence cases[19] might perhaps be used to describe his status. This designation places him in a class to which the landowner owes a duty of exercising reasonable and ordinary care to avoid injuring him.[20] And there has been some criticism of the implied invitation theory on the ground that it is fictional and difficult to apply in contrast to a doctrine of "due care under the circumstances."[21]

The Iowa Court has been reluctant to extend the scope of the attractive nuisance doctrine beyond the *Edgington* case, which is considered exceptional[22] in that the agency was a turntable, inadequately locked and unguarded in an open area where children were known to pass. To extend it to every agency capable of injuring children or appealing to their venturous instincts is thought to place an unreasonable burden upon property and unduly restrict its rightful use.[23]

Inasmuch as these cases deal with injuries to children of tender years, where emotion, sympathy and possible prejudice are often present, the courts have been reluctant to allow the facts to go to the jury. In practice, cases brought under the doctrine have usually resulted in a directed verdict for the defendant on the ground

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[18] See Harriman v. Afton, 225 Iowa 659, 663, 281 N.W. 183, 185 (1938).

[19] *E.g.*, Mann v. Des Moines Ry., 232 Iowa 1049, 1070, 7 N.W.2d 45, 57 (1942).

[20] *Ibid.*

[21] See 11 IOWA L. REV. 403 (1926).

[22] See Brown v. Rockwell City Canning Co., 132 Iowa 631, 635, 110 N.W. 12, 13 (1906).

[23] Davis v. Malvern Light and Power Co., 186 Iowa 884, 891, 173 N.W. 262, 264 (1919).

that the evidence was insufficient to support a verdict for the plaintiff.[24]

Should the doctrine be replaced by imposing upon landowners a duty to make their premises safe for infant trespassers? A forceful argument against the proposition is made by Jeremiah Smith,[25] predicated upon the basis that while the child may be entirely innocent the landowner may be equally so, *i.e.*, the child's innocence does not per se make the landowner guilty. Moreover, the logical result of such a rule is to place the duty of protecting children upon every member of the community except their parents. The problem will continue to be one of balancing the interests between the protection of children on the one hand and the free use of land and the social necessities of business and industry on the other.

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[24] The following tabulation was made from the reported cases, since *Edgington*, in which the decisions were based squarely on the attractive nuisance doctrine:

Directed verdict for defendant—Affirmed	12
Judgment for plaintiff reversed and directed verdict for defendant ordered	2
Demurrer sustained—Affirmed	1
Demurrer overruled—Reversed	1
Verdict and judgment for plaintiff—Affirmed	4
Total	20

[25] See Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349 (1898).

TAX STATUS OF PROFESSIONAL "KICKBACKS"

The uncertainty which prevailed with respect to the federal income tax status of professional "kickbacks" was to some extent clarified in the recent United States Supreme Court decision in *Lilly v. Commissioner of Internal Revenue*.[1] The petitioners, operators of several optical shops, filled prescriptions for eye-glasses brought to them by patients who were referred by various oculists. At the time the prescription was given, the oculist charged the patient a fee which purported to cover his services. The petitioners, upon delivery of the glasses to the patients, collected the cost from the patients and "kicked back" one-third of the total sale to the referring doctor. This "kickback" was made in accordance with oral agreements between the petitioners and the oculists. The petitioners contended that the "kickback" was deductible as an ordinary and necessary business expense under 23(a) (1) (A) of the Internal Revenue Code. The Supreme Court sustained this contention. It was held that the "kickbacks" were *ordinary* because the payments were made monthly in the regular course of business; they were normal, usual and customary in size and character; the transactions occurred frequently in the type of business involved; the practice was nation-wide and in accordance with long-established custom in this community. The "kickbacks" were *necessary* because the payments to the doctors were essential to establishing and maintaining the business. The Court pointed out that there is no provision in the Revenue Act or the accompanying regulations which prohibit deduction of ordinary and necessary expenses on the ground that they violate public policy and noted that the question of the deductibility of expenditures which violate federal or state law was not before the Court. The expense is deductible unless it tends to "frustrate sharply defined national or state policies proscribing particular types of conduct".[2] These policies must be "evidenced by some governmental declaration".[3]

On the basis of the principal case, it would seem that no distinction should be made between "kickbacks" and "splitting of

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[1] 72 Sup. Ct. 497 (1952).
[2] *Id.* at 500.
[3] *Id.* at 501.